RICHARD M. JOHNSON
v.
DEPARTMENT OF THE TREASURY

Docket No.
CH075209026

OPINION AND ORDER

Appellant was removed from his position as a Supervisory Criminal Investigator, GS-14, with the Internal Revenue Service, Gary, Indiana, based on the following charges: (1) thirty-seven specifications of misuse of a U.S. Government credit card; and (2) nineteen specifications of misuse of a commercial telephone credit card issued by the United States for official business. The agency alleged that appellant's actions were in violation of the Internal Revenue Manual's Rules of Conduct.[1]

Appellant filed a petition for appeal with the Board's Chicago Regional Office. Prior to the hearing, the agency withdrew the charge of misuse of the telephone credit card. In his initial decision, the presiding official sustained the remaining charge and found that removal based on that charge alone was for such cause as would promote the efficiency of the service.

Appellant filed a timely petition for review in which he makes numerous assertions of error by the presiding official. The agency's response contends that the presiding official did not err and that the petition for review does not meet the criteria for granting a petition for review set forth at 5 C.F.R. § 1201.115.

The petition for review is GRANTED.

The facts upon which appellant was removed arose out of the agency's charge that on 37 different occasions between 1976 and 1979, the majority occurring in 1978, appellant signed receipts for the use of the Government credit card issued to him in connection with the purchase of gasoline and other services for his privately-owned or leased automobiles. Appellant admitted that he used the credit card to purchase gasoline and other services for the vehicles but stated in his defense that he did not intend to violate any rule or regulation by his purchases with the card and that he had determined that his use of the card was permissible so long as he used the vehicles on official business. The record shows, however, that appellant failed to keep any records of mileage respecting the separate use of the vehicles for official and personal business.

[1] 0735.1 Internal Revenue Manual Part 226.3 states in pertinent part:

> Employees are forbidden to use Government time, property, or facilities, including equipment and supplies for conducting personal business or for other unauthorized personal purposes.

The Board notes that agency regulations and rules do not expressly prohibit the use of the credit cards to purchase gasoline and other services for "privately-owned vehicles" used for official business.[2] Use of such credit cards is mandatory for all agency employees who operate a Government-owned vehicle.[3] The agency regulations or rules, however, do not specifically require or establish procedures under which agency employees are reimbursed for the use of their privately-owned vehicles for official agency business.

The presiding official found that the preponderance of the evidence supported the agency's charge and that the penalty of removal was not so disparate or inappropriate that the agency could be considered to have abused its discretion.

We will now consider appellant's arguments contained in his petition for review.

Appellant first alleges that the presiding official and the Board's Administrative Law Judge erred by denying his discovery request concerning the charge of misuse of the telephone credit card and certain questions regarding his affirmative defense of racial discrimination. Following appellant's request for discovery, the agency dropped the charge of misusing a telephone credit card. The presiding official then limited appellant's request for production of documents to those which pertained to the issues remaining. The Board's Administrative Law Judge likewise limited the request for interrogatories finding that appellant had not made a sufficient showing of relevancy on certain questions. The Board's regulations concerning the scope of discovery are set forth at 5 C.F.R. § 1201.71 *et seq.* Under the applicable regulation, the presiding official must carefully balance the avoidance of unproductive delay in adjudication against obtaining information essential to perfect the record. 5 C.F.R. § 1201.71. The Board has carefully reviewed the determinations of the Board officials and finds that they were not erroneous. Although what constitutes relevant material in discovery is to be liberally interpreted, *Hickman v. Taylor*, 329 U.S. 495 (1947); *Bize v. Department of the Treasury*, 3 MSPB 261 (1980), the discovery requests denied by the Board officials were clearly not relevant to any remaining issue under appeal. 5 C.F.R. § 1201.72(b).

Appellant's next contention is that the presiding official erroneously refused to order the agency to produce certain evidence, including the entire inspection report, which was relied on in part to remove appellant, an internal audit report in which the allegations of the charges contained in the proposed notice of removal were first discovered, a memorandum

[2]The agency's Motor Vehicle Management Handbook defines "privately-owned vehicles" as "employee-owned vehicles used for official business on a reimbursable basis." Internal Revenue Manual MT 1(14) 47.1–9.124.

[3]MT 1(14)17.1–9.156.3. In addition, as printed on the card itself, it "may be used to purchase . . . supplies or services for properly identified U.S. Government motor vehicles, boats, or small aircraft."

submitted to the deciding official by the oral reply officer, and a memorandum for the file prepared by the deciding official. With respect to the investigation report, the proposing official, Mr. Jones, testified that he considered the entire report but only relied on certain parts (Tr. 377–381). The deciding official, however, did not testify.

In his request for interrogatories, appellant requested "any oral or written communication . . . whereby any IRS employee in his official or private capacity gave information to either Edwin Jones [proposing official] or James Caldwell [deciding official] relating to the allegations of misconduct which are the subject matters of this petition." In its response, the agency listed certain communications but did not supply the documents. In addition, the appeal file contains an edited version of the inspection report, which, although not listed in the agency response, must also be considered as a document requested by appellant's interrogatories. The agency contended that pursuant to 5 U.S.C. § 7513 and 5 C.F.R. § 752.404(b)(1) the edited report was all it was required to produce because that was the only material "relied upon" in deciding to remove appellant. The presiding official denied appellant's request for the entire investigation report for the reasons set forth by the agency. The presiding official's decision was erroneous.

This Board has held that discovery requests should not be evaluated in terms of compliance with 5 C.F.R. § 752.404(b) which gives an employee the right to review material "relied upon" to support a proposed adverse action. *Bize, supra*, 264. This Board held in *Bize* that there is no provision in the Board's regulations which allows for the exclusion of evidence requested in discovery because the agency did not rely on it. The Board has defined discovery as "the process whereby a party may obtain information . . . for the purposes of assisting . . . in planning and developing his/her case." 5 C.F.R. § 1201.72. Evidence which assists in planning a case may or may not be admissible, but as in FRCP 26(b),[4] it is discoverable.

Since one of the main functions of the Board is the adjudication of cases within its jurisdiction, 5 U.S.C. § 1205, the fairness of such adjudications can only be enhanced by disclosure of the facts in a case. Therefore, uncertainty as to the relevancy of requested evidence should

[4]FRCP 26(b) defines the scope of discovery in Federal Court cases as:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim of defense of the party seeking discovery or to the claim of defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence.* (Emphasis supplied.)

be resolved in the favor of the movant, absent any undue delay or hardship caused by such request. *Bize, id.*, 266.

As we said in *Bize, id.*, 266:

> The evidence denied appellant in this case was central to the case. The report detailed an investigation conducted into the charges which were subsequently levied against appellant, and selected portions of the report were relied on by the agency. It is reasonable to infer that the report contains summaries of witness interviews which were not disclosed to appellant. Without imputing any bad faith to the agency, it is reasonable to conclude that even if they were not exculpatory in nature, such summaries could lead to exculpatory evidence, or other witnesses. Considering that the agency had resources to conduct interviews nationwide, access to the report would be helpful to the appellant, if for no other reason than to assist him in deciding how to commit his resources. Notably, production of the report would have placed no burden on the agency, nor would it have delayed the proceedings.

In addition, the Board has reviewed appellant's request for material and finds certain other evidence denied appellant as being discoverable. The memorandum prepared by the hearing officer James Franke had to have been considered by the deciding official or appellant's oral reply would have been meaningless. 5 U.S.C. § 7513(b)(2). The memorandum prepared for file by the deciding official may perhaps list reasons why a less severe penalty was not considered. This would clearly be relevant in light of our decision in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). Finally, the internal audit report, like the investigation report, may possibly lead to exculpatory evidence, or other witnesses. Therefore, we conclude that the presiding official erroneously denied appellant's request for production of the evidence.

Accordingly, the case must be remanded, and upon remand the presiding official should require production of the requested documents and, if necessary, rule on any claims of privilege advanced by the agency. *See McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979). Assuming no valid privilege prevents production of the evidence, the presiding official must determine if further proceedings are appropriate and issue a new initial decision taking into consideration the evidence and arguments advanced after production of the report insofar as they raise matters not already fully decided herein.

Appellant's third contention is that the presiding official erred by allowing the agency to drop the second charge during the course of the appeal. Appellant claims he was harmed by this action in several respects. *See* Appellant's Petition for Review at 25. This Board is hard pressed to find any harm to appellant by the agency's action. The agency procedures in bringing this adverse action were in accordance with the statutory requirements of 5 U.S.C. § 5113(b). Withdrawal of one of the charges subsequent to the removal action merely placed appellant in

the same position he would have been in had the agency conceded that charge at the hearing. The presiding official's decision on this allegation was not erroneous.

Appellant's fourth allegation is that he was not given specific notice of the charges as required by 5 U.S.C. §§ 7513(b)(1) and (4). Appellant argues specifically that the agency charges did not supply him with specific and detailed factual statements showing a basis for the action nor did it supply him with the exact nature of the alleged offense. Appellant's contention is not supported by the record.

The reasons for a proposed adverse action must be set forth with sufficient specificity so as to allow the employee to understand what he is charged with and prepare a response. *Money v. Anderson*, 208 F.2d 34 (D.C. Cir. 1953); *Deak v. Pace*, 185 F.2d 997 (D.C. Cir. 1950); *Ricci v. United States*, 507 F.2d 1390 (Ct. Cl. 1974), *Bize, supra*, 268. Appellant was charged with thirty-seven specifications of misuse of a U.S. Government credit card. Each of the specifications listed the date of purchase, gas station used, amount of gas purchased, and the car which was used. Although 29 of the 37 specifications stated that appellant received reimbursement for mileage, appellant was aware that he was not charged with "double dipping" and did not so defend. Appellant's arguments throughout the appeal show that he was cognizant that the agency was charging him solely with misuse of a government credit card.

Appellant alleges that the presiding official erred in deciding that appellant's removal was not discriminatory and that the agency committed no prohibited personnel practices. The Board has reviewed the findings of the presiding official and based upon the evidence of record finds that no error was committed.[5]

[5]The presiding official found no violation of appellant's rights under the Privacy Act, and therefore found no prohibited personnel practice to exist with respect to the agency's disclosure to other employees and persons outside the agency of the proposed removal of appellant and his interim detail to another position. The presiding official's Privacy Act determination was based on the finding that there was no allegation by appellant that the agency had disclosed any *record* concerning appellant to any third party. We note that the Privacy Act's prohibition against the disclosure to third parties of any record contained within a system of records under the Act, prohibits the disclosure of *information* contained within the record, not merely the disclosure of the record itself. *See e.g., Turner v. Department of Army*, 447 F. Supp. 1207, 1213 (D.D.C. 1978). Therefore, the presiding official construed too narrowly the protections of the Privacy Act. However, the agency's disclosure of the information to appellant's subordinates and other persons outside the agency with whom appellant worked, including authorities within the Department of Justice, was authorized under the Privacy Act as a "routine use" of the general personnel records from which the information originated. *See* Civil Service Commission government-wide notice regarding General Personnel Records, 43 F.R. 40108 (September 8, 1978). Therefore, appellant's rights under the Privacy Act were not violated. Assuming *arguendo* that a Privacy Act violation had occurred, we need not address the question of whether a personnel action based in whole or in part on a violation of the Privacy Act constitutes a prohibited personnel practice under 5 U.S.C. § 2302(b)(11). This is because it is clear that appellant's allegations concerning a violation are the result of, rather than a factor in, the taking of the removal action.

Finally, appellant contends that the penalty of removal was too harsh.

This case was decided before the Board's decision in *Douglas, supra.* The presiding official determined that he could not mitigate the agency-imposed penalty unless it was "so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency." *Initial Decision* at 12. He therefore affirmed the removal. This was erroneous.

The Board has rejected the "abuse of discretion" test set forth by the presiding official. This Board held in *Douglas*, that the Board has the authority to mitigate penalties when it determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious or unreasonable. This authority may be exercised by the Board's presiding official, subject to our review under 5 U.S.C. § 7701(e)(1). *Douglas, id.*, 313.

In making this determination, the presiding official should consider the relevant factors[6] in order to determine whether the agency struck a responsible balance within the limits of reasonableness.

While we find no apparent error in the evidentiary findings made by the presiding official on the basis of the present record, we have found that appellant should have been furnished all material evidence which was requested even though the agency claimed it did not rely on that evidence. Therefore, a remand is necessary to allow appellant an opportunity to make further presentations warranted by the evidence.

In the new initial decision, if the presiding official finds that the agency charge is sustained by a preponderance of the evidence, he should then determine, in accordance with our decision in *Douglas*, whether the penalty imposed by the agency is for such cause as would promote the efficiency of the service.

Accordingly, the initial decision is VACATED and the case is REMANDED for further consideration consistent with this Opinion.

For the Board:

ROBERT E. TAYLOR,
Secretary.

WASHINGTON, D.C., *September 22, 1981*

[6]These factors are set forth in *Douglas*, 332.